RECENT AMERICAN DECISIONS.

Supreme Court of Wisconsin.

GILLETT v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

Where a mortgagee, under the terms of his mortgage, took out an insurance on the mortgaged property, in the name of the two mortgagors, and containing a clause that additional insurance, obtained by the insured should avoid this policy, unless the original insurer's consent be written on the original policy, one of the mortgagors cannot take an additional policy in his own name; the interests covered by the policies are identical, and the latter policy transgresses the condition of the former policy and avoids it.

If the policy had been in the name of the mortgagee, the difference in the person insured would have been radical and controlling, and the additional insurance obtained by mortgagor would not have avoided the former policy.

APPEAL from the Circuit Court of Marathon County.

Plaintiff held a mortgage on certain real estate of M. A. York & Co., a firm consisting of Mrs. M. A. York and her husband, Solomon. The mortgage was given by that firm to secure an indebtedness of $2000, which still remains unpaid. The principal value of the mortgaged premises was in a saw-mill situated thereon, and certain machinery and fixtures therein. This mortgage contained a covenant by the mortgagors to keep the buildings on the mortgaged premises insured for at least $2500, and to assign the policies to the plaintiff as collateral security for the mortgage debt, and, in default thereof, the plaintiff was authorized to effect such insurance, the costs and expenses of which to be added to and become a part of the mortgage debt. The mortgagors having failed to obtain such insurance, the plaintiff, on September 7, 1883, procured from the defendant company the policy in suit. This policy insured M. A. York & Co. against loss of the insured property or damage thereto by fire, for one year, in the sum of $1000. It contained a stipulation that the same should be void "if the insured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon." It permitted $2000 total concurrent insurance, and provided, "loss, if any, under this policy, payable to J. D. Gillett, Esq., as his interest may appear." In March,

1884, Mrs. York, without the consent of the defendant company, procured further insurance on substantially the same property, in several other insurance companies, amounting in the aggregate to $4000. August 16, 1884, the insured property was destroyed by fire. In November, 1884, plaintiff furnished defendant company with proofs of such loss, in which such insurance of $4000, obtained by Mrs. York, was stated. The defendant refused to pay the insurance written in the policy, and the plaintiff brought this action to recover it. The foregoing facts were conclusively established by the pleadings and the testimony on the trial, to which further reference is made in the opinion. The circuit judge directed the jury to return a verdict for the defendant, which they accordingly did. A motion for a new trial was denied, and judgment entered for the defendant pursuant to the verdict. The plaintiff appealed from the judgment.

Silverthorn, Hurley & Ryan, for appellant.

Cate, Jones, & Sanborn, for appellee.

LYON, J. Dec. 22, 1888. (*After stating the facts as above.*) To strengthen his security for the mortgage debt by an insurance upon the mortgaged property, two methods were open to the plaintiff. He might have taken a policy directly to himself, insuring his mortgage interest alone, if he could find an insurer willing to issue such a policy; or he could obtain a policy running to the mortgagors, stipulating that the loss, if any, should be paid to him as his interest should appear. Perhaps such a policy would not be an insurance of the mortgage interest, as such, but probably would cover such interest. Either mode would protect the plaintiff's security under his mortgage, but with this difference: had the policy run to himself alone, insuring only his mortgage interest, it would not be defeated by an unauthorized insurance upon the same property, obtained by the mortgagors, while a policy running to the mortgagors, insuring the property generally (as in the present case), would be defeated by such unauthorized insurance.

The plaintiff did not stipulate with the agent of the defendant company, Mr. Huntington, for a policy to himself,

insuring only his mortgage interest. The only testimony on the subject was given by the plaintiff himself, and is as follows: "I applied to Mr. Huntington for the insurance on this property after the mortgage was executed. I received this policy upon the application." In answer to the question by his own counsel, "At the time when you applied to Mr. Huntington for this insurance did you state to him what interest you had in the property?" he further testified: "I think I did tell him that I had a mortgage on the property, and wanted to insure my interest in it." He further testified that he paid the premium for such insurance. Thus, it is undisputed that the plaintiff applied for an insurance upon the mortgaged property to secure his interest therein under his mortgage, without any agreement or reservation as to its form or the stipulations it should contain. The agent issued the policy in suit upon such application, which gives the plaintiff the security he desired. The plaintiff accepted it as a compliance with his application, and held it nearly a year before the property was burned, without making any objection that it did not comply with the original parol contract for the insurance. We think it too late for the plaintiff to be now heard to allege that the policy does not contain the terms of the contract of insurance which the parties made, even did the testimony tend to show (which it does not), that a parol agreement was in fact made to the effect that the policy should issue to the plaintiff, insuring the mortgage interest alone.

Much weight is given to the argument of counsel for the plaintiff to the fact that the plaintiff paid the premium for the insurance. But this fact must be considered in connection with the covenant in the mortgage that the mortgagors should insure the property, and, failing to do so, that the plaintiff might insure the same, and that the expense thereof should be added to and constitute a part of the mortgage debt. So, when the plaintiff says he paid the premium for the insurance, the effect of his testimony is that he thereby increased the mortgage debt by the sum so paid. Moreover, the above covenant clearly contemplates an insurance of the mortgagors' interest in the property, which could only be

effected by a policy running to them. The covenant is ample authority to the plaintiff to insure the property in their names.

Having thus determined that the plaintiff is bound by the stipulations in the policy in suit, it necessarily results that the obtaining by the mortgagors of any unauthorized insurance on the same property invalidates the policy, under the stipulation therein against additional insurance without the consent of the defendant company. Has this stipulation been violated? Mrs. York, one of the owners of the property, obtained policies in her name alone in March, 1884, on substantially the same property, for $4000, without the consent or knowledge of the defendant company. Nothing appears adverse to the validity of such additional insurance. The policy in suit permitted concurrent insurance to the amount of $2000 only. Had this insurance been effected by M. A. York & Co., it would doubtless have defeated the policy. It may be conceded that these policies for $4000 insured only the interest of Mrs. York in the insured property, which, presumably, is one-half thereof.

It is maintained by counsel for plaintiff that, because the policies were obtained by and issued to Mrs. York alone, the $4000 insurance is not a breach of the stipulation against other insurance. The rule invoked to support this proposition is thus laid down in 2 Wood on Ins. § 377: "In order to amount to other insurance, the interests covered by the policies must be identical." We think such interests are identical in the present case. The policy in suit insures the interest of Mrs. York in the insured property, and the additional policies issued to her insure the same interest. We find no established rule that because Solomon York's interest in the property was insured by the policy in suit, and not by the $4000 policies, the latter policies do not constitute double insurance. In *Insurance Co.* v. *Hulman* (1879), 92 Ill. 145, it was held that any unauthorized insurance by a wife, violated a stipulation in a former policy on the same property, issued to her and her husband. Such we think the law. Several distinctions between the Illinois case and the one under consideration are noted by counsel, some of which are real and

some are not, but we think these do not affect the applicability of the rule, there laid down, to this case. The case of *Insurance Co.* v. *Foster* (1878), 90 Ill. 121, is relied upon as holding a different rule. The case is this: Foster held a mortgage on certain property, executed by B. He obtained an insurance upon the property, paid the premium, and, without the knowledge or authority of B., took a policy in their joint names; the policy containing the usual stipulation as regards other insurance. B. had obtained another insurance in violation of the stipulation. The Court held that, under the circumstances, the insurance was solely for F.'s benefit, and that the policy was not invalidated by such act of B. The difference between the two cases is, the policy in the Illinois case ran to Foster, the mortgagee, and, in legal effect, as the Court held, to him alone, while here the policy runs to the mortgagors alone. This difference is radical and controlling, and calls for the application in this case of a different rule of law. Another case, much relied upon by counsel for the plaintiff, may properly be noticed in this connection. It is that of *Pitney* v. *Insurance Co.* (1875), 65 N. Y. 6. Norman and George N. Pitney were joint owners of the insured property, which was a quantity of wool. Norman obtained a policy in his own name. Afterwards he told the agent that he had forgotten to mention the interest of George, and his intention to have that interest insured. The agent attempted to accomplish that purpose by inserting in the policy these words: "In case of loss, if any, one-half payable to George N. Pitney, as his interest may appear." Under the circumstances, it was held that the interest of George N. in the wool was covered by the policy. That case does not hold that a breach of covenant against further insurance would not have resulted, had either of the owners of the wool insured his interest therein in his own name without the consent of the company. Hence the case is not in point here. That case was decided by a bare majority of the commission of appeals: LOTT, Ch. C., and EARL, C., dissenting. We should hesitate to indorse all the doctrines there asserted without further examination.

We conclude that the policy in suit was invalidated by the

unauthorized insurance obtained by Mrs. York, and hence that the Court properly directed a verdict for the defendant.

The judgment of the Circuit Court is affirmed.

It is unnecessary to cite authorities to the proposition, that a condition in a policy, prohibiting the insured from insuring the same property in another company, or limiting the amount of insurance which may be obtained elsewhere, is valid. And it is equally well settled, that a subsequent insurer may relieve itself from liability, by a stipulation in its policy, if there is existing insurance, which is not disclosed and assented to.

Rule of construction.—Conditions in contracts which provide for a forfeiture, are not looked upon with favor, especially when there has been a performance by one of the parties. But the same degree of jealousy is not entertained by all the Courts, of the condition prohibiting other insurance, as of most of the conditions which make the modern insurance policy such a prolix and complicated instrument. This distinction rests on the ground that the condition is a reasonable one, a protection against fraud, and in support of a sound public policy: *Turner* v. *Meridian Co.* (1883), U. S. C. Ct., D. R. I., 16 Fed. Repr. 454. Being a known part of the contract, the condition will receive a fair and reasonable interpretation, according to the terms and obvious import of the language used: *Carpenter* v. *Providence Co.* (1842), 16 Pet. (41 U. S.) 495, 512. A precisely literal or inflexibly stringent interpretation against the insurer, would often be inconsistent with public policy, reason and justice, and not required by the wise maxim that ambiguities should be construed most strongly against the party who framed the instrument in which they are used: *Manhattan Co.* v. *Stein* (1869), 5 Bush (Ky.), 652. But it will fully appear in the course of this note, that this view is not satisfactory to some Courts. For the present, let it suffice to observe that the rule stated, does not apply if there is any uncertainty in the language used. Ambiguous stipulations, prohibiting other insurance, are restrictions on the right of the insured to redress against the insurer. They impose a burden on the insured, for the insurer's benefit, and must therefore be strictly construed: *Warwick* v. *Monmouth County Mut. Co.* (1882), 44 N. J. L. 83. The common-law rule of strict construction in regard to forfeiture, is wholesome and sound. "Parties may contract very much as they choose, so long as they keep within the law; and it may be assumed there is some reason for each condition adopted. But there is great hardship, in allowing parties to keep money which they have not fairly earned, and great wrong, in favoring blind conditions, or those which parties do not fully understand, where they are not in actual fault. A close construction is the only just one:" *Westchester Co.* v. *Earle* (1876), 33 Mich. 143.

A condition in a policy, limiting the amount for which the defendant should be liable, expressed that every person "insuring," was required to give notice of any other insurance "effected." This was held to include subsequent, as well as prior insurance: *Warwick* v. *Monmouth County Mut. Co.*, *supra*. A requirement that notice shall be given "of any insurance made," applies to subsequent as well as prior insurance. The judge who wrote the opinion in

this case indicated that his conviction was otherwise; the ruling was made in deference to authority, it having been so held in *Harris* v. *Ohio Co.* (1832), 5 Ohio, 466; *Stacey* v. *Franklin Co.* (1841), 2 W. & S. (Pa.), 506, 547. It was expressed that the policy "shall become void, if any other insurance be made, which, together with this insurance, shall exceed," etc. This related to subsequent insurance only: *Mussey* v. *Atlas Co.* (1856), 14 N. Y. 79. The other insurance contemplated by the usual condition, is insurance effected in another company, after the policy issued, or if previously existing, not then known to the insured. Insurance which is disclosed by the application is not within the reason of the condition: *Lockwood* v. *Middlesex Mut. Co.* (1880), 47 Conn. 553.

Plaintiff warranted that his title to the property insured was derived from a contract, and in reply to the question, "how much insured in other companies?" answered "none." This was interpreted to mean that plaintiff had no insurance in other companies. The question was not meant to elicit information concerning insurance by another, as plaintiff's vendor: *Sprague* v. *Holland P. Co.* (1877), 69 N. Y. 128.

Who is the insured?—The policy was to the owner of the property, and prohibited other insurance "on the interest hereby insured." The property was seized at the instance of creditors, and the officer who had the custody of it, insured it for their benefit. The insurance so effected, was not prohibited: *Marigny* v. *Home Mut. Co.* (1858), 13 La. An. 338. A warranty of no other insurance, made by the consignor of a vessel, who had obtained insurance on its freight, is not broken because the consignee, who has accepted a draft against such freight, without the knowledge of the consignor, makes an insurance thereon: *Williams* v. *Crescent Mut. Co.* (1860), 15 La. An. 65.

A policy to a mortgagor, contained authority for an assignment of it to a person named, who was in fact mortgagee of the property, but was not so described. The mortgagor obtained another policy subsequently, which was to be void, if prior insurance existed by the insured on the property thereby insured. The first policy was never in fact assigned, but this was considered immaterial, and it was ruled that it covered the interest of the mortgagor, and the second policy, not containing the required consent, was void: *Carpenter* v. *Providence Co.*, *supra*. A policy to mortgagors, the loss being payable to their mortgagee, insures the former only, and a subsequent policy, obtained contrary to its conditions, by one of the mortgagors, avoids it: *Continental Co.* v. *Hulman* (1879), 92 Ill. 145; *Friemansdorf* v. *Watertown Co.* (1879), 9 Biss. U. S. C. Ct., N. D. Ill. 167; *Lias* v. *Roger Williams Co.* (1880), U. S. C. Ct. D. N. H.; 8 Fed. Repr. 187.

An equitable mortgagor, who insures the whole property under authority from the mortgagee, is within the condition, prohibiting other insurance by the insured. The Court observed: It is the thing, and not any particular form of doing it, which is guarded against, and that thing is such subsequent insurance on the property as would lessen the interest of the insured in its preservation; and this includes all subsequent insurance which, when recovered, will go to the benefit of the insured in the first policy. And so, if the mortgagee did in fact, cover his own special interest as mortgagee, and the mortgagor agreed to pay the expense of obtaining the insurance, then, although

the mortgagee would have a lien on the insurance money as security for his debt, yet the mortgagor could compel its application to the payment of his debt, and any surplus would belong to him. Hence subsequent insurance obtained by the mortgagor, is effected by the insured: *Holbrook* v. *American Co.* (1852), 1 Curt. (U. S. C. Ct.) 193, 201. And so a policy to a mortgagor, assigned by him to the mortgagee, is avoided by one subsequently obtained by the purchaser of the mortgagor's rights: *Moulthrop* v. *Farmers' Mut. Co.* (1879), 52 Vt. 123.

If there is no agreement between the mortgagor and the mortgagee whereby the former was to be interested in a policy obtained by the latter, a previous policy to the mortgagor is not avoided by one in the mortgagee's favor: *Guest* v. *New Hampshire Co.*, Sup. Ct. Mich., 1887. A policy obtained by a mortgagee in favor of the mortgagor, without the knowledge of the latter, does not avoid one procured by the mortgagor, without notice to the insurer of the former: *Nichols* v. *Fayette Mut. Co.* (1861), 1 Allen (Mass.) 63. Insurance upon a mortgagor's interest does not defeat a subsequent policy on the same property, in favor of the mortgagee and the mortgagor, the loss being payable to the former, and the latter not being aware of the existence of the second policy: *Westchester Co.* v. *Foster* (1878), 90 Ill. 121. If the mortgagor's application for insurance notifies the insurer that the property is mortgaged, and that the mortgagee has the right to insure it to an amount stated, and if, pursuant to such right, without the mortgagor's knowledge, the mortgagee obtains a policy, it is not other insurance: *Carpenter* v. *Continental Co.* (1886), 61 Mich. 635.

A policy upon property, the legal title to which was in the mortgagor's assignee, was payable to the mortgagee. Without the consent of either of these, the mortgagor insured the property in his own name as owner. Such policy did not affect the first one. It was obtained by a stranger, on his own interest, and could not be controlled or prevented by the mortgagee nor the mortgagor's assignee: *Wheeler* v. *Watertown Co.* (1881), 131 Mass. 1. The insurance was for the benefit of the mortgagee of the property, and the policy contained the usual prohibition against other insurance, but provided that no sale or transfer of the property insured should affect the mortgagee's right. A second mortgage was executed; after entering, for the purpose of foreclosing, the second mortgagee insured the property without the consent of the first insurer. This insurance did not affect the rights of the first mortgagee: *City Five Cent Bank* v. *Pennsylvania Co.* (1877), 122 Mass. 165.

The mortgagor was insured, the loss being payable to the mortgagee: Subsequently the mortgagee insured the same property, without defendant's knowledge, the loss being payable to him. In reply to the point that this constituted double insurance, the Court observes: "The answer to this is that the insured, the mortgagor, did not procure the further insurance, that he did not know of it until after the loss, and that the mortgagee was not his agent, in any sense, to procure such insurance. It is true that the mortgage contained a clause, providing that the mortgagor should keep the mortgaged buildings insured, and assign the policy to the mortgagee, and that in case of default on his part, the mortgagee might procure such insurance at his expense, and add the amount paid therefor to his mortgage. But that clause could not operate until

there was default on the part of the mortgagor, and he could be put in default only upon refusal or neglect to procure the insurance, after some sort of notice or demand. Besides, the mortgagee, in procuring that insurance, acted for himself and in his own interest; and hence his act in procuring it, cannot be so far regarded as the act of the mortgagor, as to violate the prohibition against other insurance. The mortgagor did not ratify the mortgagee's act, so as to be bound by it, in making proof of the loss:" *Titus* v. *Glen's Falls Co.* (1880), 81 N. Y. 410; *Doran* v. *Franklin Co.* (1881), 86 Id. 635.

A policy to a mortgagee, as such, is not affected by an insurance of the mortgagor's interest, though it be for the benefit of the mortgagee, if it was procured without his knowledge or request: *Johnson* v. *North British Co.* (1872), 1 Holmes (U. S. C. Ct.) 117.

Other insurance by the insured or his assigns, was prohibited. The prohibition did not extend to an absolute purchaser of the property insured, who did not become the assignee of the policy according to its terms, nor to one who acquired a lien thereon, or other interest by way of mortgage: *Holbrook* v. *American Co.*, *supra.*

Property covered by a policy admitted to have been made on account of another than the insured, was assigned in trust for the creditors of the party beneficially interested. The trustees named in the assignment, effected other insurance without giving notice. This avoided the first policy: *Leavitt* v. *Western Co.* (1844), 7 Rob. (La.) 351.

A policy to tenants in common of personal property is avoided by a subsequent one, to one of such tenants, no mention being made of the joint ownership: *Pitney* v. *Glen's Falls Co.* (1875), 65 N. Y. 6; *Harridge* v. *Dwelling House Co.*, Iowa Sup. Ct., Oct. 1888. A part owner of a vessel has no authority, by reason of such ownership, to insure the interests of his co-owners; hence a policy upon the whole vessel taken by him in his name, without previous authority or subsequent ratification by the other owners, is invalid, except as to the interest of him who procured it: *Knight* v. *Eureka Co.* (1875), 26 Ohio St. 664. But a warranty against other insurance is broken when part of those who made it obtained such insurance for their own benefit: *Mussey* v. *Atlas Co.* (1856), 14 N. Y. 79.

The naked legal title, to the property insured, was in the trustee under a will. By the terms of the will and a division of the estate, some of the devisees had become entitled to an undivided portion thereof. The interest of one of these was insured. Subsequently the trustee, as such, and without stating for whom, insured the same property without the knowledge or consent of the person who was already insured. Parol evidence was received to show that the later policy was intended to apply only to the uninsured interest: *Franklin Co.* v. *Drake* (1841), 2 B. Mon. (Ky),47.

A policy obtained by a vendee, and assigned to his vendor, pursuant to their contract, avoids a policy subsequently obtained by the vendor for his own benefit: *Neve* v. *Columbia Co.* (1842), 2 M'Mull. (S. C.), 220. But if the vendee is in possession of the property, under a valid contract for a deed, part of the purchase-money being unpaid, a policy to the vendee is not avoided by a previous one issued to the vendor, no assignment of such policy being made to the purchaser before loss. The policy held by the vendor protected his interest in the property: *Ætna Co.* v. *Tyler* (1836), 16 Wend. (N. Y.) 385; affirming *Tyler*

v. *Ætna Co.*, 12 Id. 507. Insurance by a vendor does not constitute a breach of warranty by his vendee, that there is no insurance: *Sprague* v. *Holland P. Co.*, *supra*. An insured stock of goods was mingled with another insured stock, acquired by purchase. The vendor's policy, with the insurer's consent, was assigned to the vendee, and the latter's policy was changed to cover his original stock in the place to which it was removed. The vendee's policy was avoided: *Walton* v. *Louisiana Co.* (1842), 2 Rob. (La.) 563; *Washington Co.* v. *Hayes* (1867), 17 Ohio St. 432.

One to whom a policy is payable in case of loss, and who has become, with insurer's assent, the assignee of the interest of the insured in the policy, is only entitled to receive what the insured could recover, and the latter's act in procuring other insurance bars the assignee's right to recover: *Hale* v. *Mechanic's Mut. Co.* (1856), 6 Gray (Mass.), 169.

What property is insured.—The words "property hereby insured," refer to the interest of the insured in the property: *Johnson* v. *North British Co.* *supra*. Neither the policy of the law nor the contract of insurance, when such words as are quoted are employed in the latter, forbids as many several insurances upon the same property as there are separate insurable interests. The policy of the law is to prevent insurances in excess of the value of the thing insured in favor of the same party and against the same risks; and hence the restrictive clause, whatever its form, unless its language clearly demands a different interpretation, should be held operative to this extent only, and the term property, in such clause, means the interest of the assured: *Springfield Co.* v. *Allen* (1871), 43 N. Y. 389.

The owner of an insured mill leased it for a term of years. While in possession, the lessee took out part of the old machinery and substituted new in its place, at his own expense. He insured such new machinery and assigned the policy to the lessor as security for a loan. The insurances were upon different property: *Planter's Mut. Co.* v. *Rowland* (1886), 66 Md. 236.

It was formerly held in New York, where a specific parcel of property was insured, and the same property was covered by another policy, which also included other property of the same assured, that the latter was to be thrown out of view, and did not constitute other insurance: *Howard Co.* v. *Scribner* (1843), 5 Hill (N. Y.), 298. This case was followed in *Sloat* v. *Royal Co.* (1865), 49 Pa. 14. The first policy in the last case was on a building, the second one was on the same building, and the shafting, machinery, belting, etc., contained in it. The insurance was held not to be double. The contrary rule is now established in New York: *Ogden* v. *East River Co.* (1872), 50 N. Y. 388; and in Ohio: *Phœnix Co.* v. *Michigan, etc. R. R. Co.* (1875), 28 Ohio St. 69.

No person, whose property was insured by defendant, was "allowed to insure the same, or any property connected with it," elsewhere. The property covered by the policy was a store building. It was ruled that the stock in trade therein was not "connected" with the building: *Jones* v. *Maine Mut. Co.* (1841), 18 Me. 155. Insurance on such a stock is not contrary to a condition prohibiting other insurance on any house or building: *Illinois Mut. Co.* v. *O'Neile* (1851), 13 Ill. 89.

A policy, covering a stock of goods, divided the whole amount for which it was written, into two classes, and

provided that if the assured "shall hereafter make any other insurance on the hereby insured premises," without giving notice, it should be void. This was taken to mean, that if any part of the goods mentioned was subsequently insured, the whole policy should become void: *Associated Firemen's Co.* v. *Assum* (1853), 5 Md. 165.

When is there other insurance?— Where it is sought to enforce a forfeiture, because of a subsequent policy, it must appear that such policy was delivered, by the insurer to the insured, with the intention that it should take effect as its contract, and was accepted by him as a contract then binding: *Continental Co.* v. *Horton* (1873), 28 Mich. 173.

If a policy is surrendered, the surrender to take effect at a time stated, it is of no force after such time, though it may not be discharged by the company until a later day: *Atlantic Co.* v. *Goodall* (1857), 35 N. H. 328; *Hadley* v. *New Hampshire Co.* (1875), 55 Id. 110. If one who is insured surrenders a policy to an agent of the company which issued it, such agent having previously taken the surrender of policies and had them cancelled, his acts in this regard having been approved by his principal, the policy is of no force from the time it is surrendered, although the company declined to repay any part of the premium, the agreement between the agent and the insured not providing for the return of any specific sum. The subsequent taking of such policy from the agent by the insured, after a loss, did not revive it: *Train* v. *Holland P. Co.* (1875), 62 N. Y. 598. This case was again before the Court on a different state of facts, and is reported (1877) in 68 N. Y. 208.

It was fully understood and agreed that an existing policy should be cancelled, if the one in suit was taken. This understanding was carried into effect by an act which, if not actually before the manual reception of the policy issued by defendant, was substantially contemporaneous. The cancellation was one of several steps which were to be taken to complete the second insurance, and whether taken a few minutes or a few hours before or after any other step necessary to effect a completed contract, was immaterial, if all were taken substantially at the same time and before the transaction was closed: *Continental Ins. Co.* v. *Horton* (1873), 28 Mich. 173.

A broker obtained $15,000 insurance for the plaintiff, distributed in a number of companies. Defendant's policy showed the total insurance, and prohibited in the usual terms, other insurance. Subsequently the agent of one of the companies gave such broker written notice that its policy for $3000 was cancelled. The broker then obtained a policy for $1500 in another company. It did not appear that the policy which was cancelled reserved the power to the company which issued it to cancel it, or that there was any agreement of the parties to that effect, and plaintiff showed that he, personally, never consented to the cancellation, and no authority to do so was shown to have been given the broker. His agency to procure the insurance implied no authority to terminate it. Hence it did not appear but that the cancelled policy was a valid and subsisting contract of insurance when the policy for $1500 was obtained: *Rothschild* v. *American C. Co.* (1881), 74 Mo. 41.

Defendant, in an action upon his premium note, set up that when the policy for which the note was given was applied for, he had insurance in another company, the fact concerning

which was not endorsed on such policy. The first was surrendered after the second was obtained. The evidence tended to show that it was understood and agreed by the parties to the second policy, that it was not to be in effect until the first was surrendered, and that neither of them contemplated double insurance. The defendant was held liable: *Atlantic Mut. Co.* v. *Goodall* (1854), 9 Fost. (N. H.) 182; s. c. (1857), 35 N. H. 328.

As intimated in the second paragraph of this note, there is a wide difference of opinion held as to the effect to be allowed the usual clause prohibiting other insurance. This variance of views grows out of the construction given to the word "insurance." What may be called the New England view is, that the insurance contemplated by the first insurer is a contract which is valid, legal, and enforceable, and that a subsequent policy, payment of which cannot be compelled, is not within the condition. This was first held in *Jackson* v. *Massachusetts Mut. Co.* (1839), 23 Pick. (Mass.) 418. The doctrine is well established in Massachusetts: *Clark* v. *New England Co.* (1850), 6 Cush. (Mass.) 342; *Hardy* v. *Union Mut. Co.* (1862), 4 Allen (Mass.), 217; *Wheeler* v. *Watertown Co.* (1881), 131 Mass. 1; *Thomas* v. *Builders' Mut. Co.* (1875), 119 Id. 121. It was declared in Pennsylvania in 1841: *Stacey* v. *Franklin Co.*, *supra*. In New Jersey in 1854: *Schenck* v. *Mercer County Mut. Co.* (1854), 24 N. J. L. 447; *Jersey City Co.* v. *Nichol* (1882), 35 N. J. Eq. 291. In Maine, by a *dictum*, in *Philbrook* v. *New England Mut. Co.* (1853), 37 Me. 137; and fully in *Lindley* v. *Union Farmers' Mutual Co.* (1876), 65 Id. 368. In Ohio in *Knight* v. *Eureka Co.*, *supra*. In Virginia in *Sutherland* v. *Old Dominion Co.* (1878), 31 Grat. (Va.) 176. In New Hampshire in *Gale* v. *Belknap County Co.* (1860), 41 N. H. 170; *Gee* v. *Cheshire County Mut. Co.* (1874), 55 Id. 65. By Judge DILLON in *Allison* v. *Phœnix Co.* (1873), 3 Dill. (U. S. C. Ct. D. Iowa), 480.

An Indiana case (*Rising Sun Co.* v. *Slaughter* (1863), 20 Ind. 520) is usually cited as being in accord with the cases referred to. The rule there laid down is that a totally invalid insurance is not within the prohibition. The case was ruled on the erroneous assumption that, because the agent of a foreign company had not complied with the statute concerning such companies, its policy was utterly void. The present rule in Indiana is stated *infra*.

The validity of the subsequent policy is to be determined by the facts which existed before the loss occurred. The prior insurer is not injuriously affected by what subsequently transpired between the company which issued the second policy and the insured, although such company paid the loss: *Hardy* v. *Union Mut. Co.*, *supra*; *Thomas* v. *Builders' Mut. Co.*, *supra*; *Lindley* v. *Union Mut. Co.*, *supra*; *Fireman's Co.* v. *Holt* (1878), 35 Ohio St. 189.

If the policy which increased the insurance beyond the amount covenanted to be taken by the insured in a prior policy is void at the time of loss, it does not constitute a breach of the covenant; but if it is voidable only by reason of the breach of a condition enabling the insurer to avoid it, but which it has waived, there is a breach: *Mitchell* v. *Lycoming Mut. Co.* (1865), 51 Pa. 402. If the policy, which was obtained contrary to the conditions of another contract, was not in force when the loss occurred, the condition against other insurance is not violated: *N. E. F. & M. Co.* v. *Schettler* (1865), 38 Ill. 166; *Ober-*

meyer v. *Globe Mut. Co.* (1869), 43 Mo. 573. In the last case the insured intended to meet the conditions of the policy sued upon. He received notice that one of his policies would be cancelled at a certain time, and procured another of equal amount; the cancellation did not take effect until the one so procured had been in force a month. When the loss occurred such policy had been discharged. A contract, entered into under a mutual mistake as to the existence of other insurance, does not avoid a prior policy, the policy so contracted for never having been delivered: *Wilson* v. *Queen Co.* (1881), U. S. C. Ct. W. D. Pa., 5 Fed. Repr. 674. A policy may be cancelled without the consent of the company which has issued another policy on the same property. The insured is not bound to have a policy declared invalid, before he may be relieved from liability for a forfeiture, because he obtained other insurance: *Hand* v. *Williamsburgh Co.* (1874), 57 N. Y. 41.

A condition providing for a forfeiture, whether other insurance, if taken, be valid or not, is void, it seems, for repugnance to the nature of the contract evidenced by the policy, because it is against an attempt resulting in total failure. A policy with such a condition does not become immediately void upon obtaining another, but subsists so as to render the latter double insurance: *Gee* v. *Cheshire Mut. Co.*, *supra*. But see *infra*.

The second policy contained a printed condition that it should be void if any other insurance was taken on the property covered by it, and was not indorsed. A written clause in it was in these words: "Other insurances permitted without notice, until required." Considered in connection with other provisions in the policy, this writing was held applicable to prior as well as to subsequent insurance, and was not avoided by prior insurance, but itself avoided a policy existing when it issued, and containing similar language: *Kimball* v. *Howard Co.* (1857), 8 Gray (Mass.) 33.

The opposing view was first declared by the Supreme Court of the United States in 1842, when it was ruled that a policy obtained by misrepresenting material facts, is not void *ab initio*, but merely voidable, and may be avoided by the company which issued it upon due proof of the facts; but, until so avoided, it must be treated for all practical purposes as a subsisting policy. Notice of it must be given the other insurer: *Carpenter* v. *Providence Co.*, *supra*. Referring to the cases which declare otherwise, the Court observes that they are distinguishable from this case. Questions of this character are questions of general commercial law, and depend upon construction, and are not regulated by local policy or customs. Judge DILLON was of the opinion that this case does not establish that a second policy is to be considered in all respects valid, unless it is avoided by the insurer before loss: *Allison* v. *Phœnix Co.*, *supra*. But Judge COLT thinks otherwise: *Turner* v. *Meridian Co.*, *supra*.

In New York the rule that if the invalidity of the second policy does not appear on its face, it avoids the prior one, was adopted in *Bigler* v. *New York C. Co.* (1860), 22 N. Y. 402. If a second policy is void *ab initio*, the insured is not thereby relieved from the forfeiture resulting from the violation of the stipulations contained in the first. This is ruled on the ground that, to hold a contract which has been violated by only one of the parties to it, void as to both, is to put it in the power of either, after making

it, to render it a nullity by simply violating some one of its conditions: *Stevens* v. *Phœnix Co.* (1884), 83 Ky. 7; *Baer* v. *Phœnix Co.* (1868), 4 Bush (Ky.), 242; *Allen* v. *Merchants' Mut. Co.* (1878), 30 La. An. 1386.

If the clause, prohibiting other insurance, uses the words "whether valid or not," all inquiry as to the validity of a subsequent policy is immaterial: *Continental Co.* v. *Hulman* (1879), 92 Ill. 145. The use of the words quoted is an agreement that the validity or invalidity of other insurance, taken without consent, should not be the subject of future contract. Such an agreement is not against public policy, nor is it prohibited by law. If the prohibited policy, held or received by the insured, is in and of itself invalid and void, so that in fact it constitutes no contract of insurance, it will not affect the validity of another policy. But if, to avoid it requires the production of facts extraneous to the policy, it will avoid another policy: *Phœnix Co.* v. *Lamar* (1886), 106 Ind. 513. Under such a condition, an invalid policy, obtained in good faith, avoids a prior one: *Sugg* v. *Hartford Co.* (1887), 98 N. C. 143; *Somerfield* v. *State Co.* (1881), 8 Lea (Tenn.), 547. *Contra: Stevens* v. *Citizens' Co.* (1886), 69 Iowa, 658.

When defendant issued its policy, the property was already insured by a policy which provided that it should be void if other insurance was taken, whether it was valid or not. The same provision was in the policy sued upon. The first policy was not at once invalidated on the issue of the second, and the latter was itself void: *Keyser* v. *Hartford Co.*, Sup. Ct. Mich., July, 1887.

Under the usual prohibitory clause, the words "valid or invalid" being absent, a policy, voidable at the election of the insurer, is a violation: *Landers* v. *Watertown Co.* (1881), 86 N. Y. 414, reversing s. c. (1879), 19 Hun (N. Y.), 174; *Emery* v. *Mutual Co.* (1883), 51 Mich. 469; *Robinson* v. *Fire Ass'n* (1886), 63 Id. 90; *Turner* v. *Meridian Co.*, *supra; American Co.* v. *Reploggel*, Sup. Ct. Ind., March, 1888; *Equitable Co.* v. *McCrea* (1881), 8 Lea (Tenn.), 541; *Funke* v. *Minnesota Farmers' Mut. Co.* (1882), 29 Minn. 347; *Lackey* v. *Georgia, etc. Co.* (1871), 42 Ga. 456.

A forfeiture is not avoided because the insured obtained other policies without knowledge of the condition forbidding it, and in good faith: *Gee* v. *Cheshire Mut. Co.*, *supra; Zinck* v. *Phœnix Co.* (1882), 60 Iowa, 266; *Allen* v. *Merchants' Mut. Co.*, *supra; Bonneville* v. *Western Co.* (1887), 68 Wis. 298; *Keyser* v. *Hartford Co.*, *supra.*

If the insured warranted his answers concerning the amount of his insurance, and unintentionally misstated its amount, his good faith is immaterial, though the insurer knew the fact to be otherwise than as it was stated: *Commonwealth Mut. Co.* v. *Huntzinger* (1881), 98 Pa. 41.

A third view of the question under consideration is taken in Iowa, where it is held that the right to recover under the prior policy, depends upon the act of the second insurer. If its policy has been treated by it as valid, any breach of the conditions therein being waived, the right of action upon the prior policy is gone: *Hubbard* v. *Hartford Co.* (1871), 33 Iowa, 325; *David* v. *Hartford Co.* (1862), 13 Id. 69; *Behrens* v. *Germania Co.* (1884), 64 Id. 19.

As has been suggested, the New England rule is largely rested upon the construction given the word insurance. The opposing rule is supported on the theory that it is in harmony with the intention of the

parties and in furtherance of public policy. The argument in support of the latter and against the former view is thus stated by the Minnesota Court: "The plaintiff intended to secure indemnity by the second insurance, and thereby removed from his mind all motives of self-interest in the preservation of the property, so far as other insurance could have that effect. Whatever increased hazard other insurance could cause, was effected to the full extent if insured supposed the second policy valid and enforceable; and, in a less degree perhaps, if he knew it to be void at the election of the insurer, and that he could not recover on it if the facts avoiding it should be discovered. The Court criticises the narrow construction given the word insurance, and observes that it is not at all necessary, from a consideration of the proper and natural import of the word, and we are unable to comprehend how it can be regarded as expressing the agreement in the minds of the parties, without disregarding what every one must understand to have been the purpose contemplated. The same construction would make a second insurance inoperative to terminate the liability of a prior insurer, under the usual conditions of a policy, if it should appear after the loss had occurred that the second insurer had been, from the time of making the contract, insolvent. The word insurance, in common speech and with propriety, is used quite as often in the sense of contract of insurance, or act of insuring, as in that of expressing the abstract idea of indemnity or security against loss. In that sense the word was used in this contract. The rule in Iowa is also disapproved, on the ground that it "makes the validity of the contract between two parties depend not upon their own agreement, nor upon their own acts, but upon what another person, a stranger to the contract, may do, even after the liability upon the contract had become absolute by the destruction of the property, if, in fact, there was any obligation. The making of the second contract of insurance violated the terms of the former contract, if at all, at the time such second contract was made. The subsequent affirmance, or disaffirmance, of that contract by the insurer, as he might elect, would not affect the validity of the former contract between other parties:" *Funke* v. *Minnesota Farmers' Mut Co.*, *supra.*

In line with the view of the Minnesota Court, as to the question of public policy, is a Georgia case ruled under a statute which provides that "a second insurance, unless by consent of the insurer, voids his policy." It is said of this provision that it is founded in public policy; it is intended to protect insurers and the public against the evils of double insurance. It is just as entirely within this public policy to have a second insurance which one thinks is good, as to have one which is really good. Though there is a second policy, technically there may be no second insurance; but to give this construction to the statute would be, indeed, sticking in the bark. The manifest intent of the law is to prevent the existence of persons in the community who have an inducement to set their houses on fire. To say that this law does not apply to the case of a man who, in fact, has this inducement, but who, if his fraud is discovered, cannot get the benefit of it, is making the law of very little effect. The second policy in this case was not binding upon the company in consequence of misrepresentations made by the insured: *Lackey* v. *Georgia, etc. Co.*, *supra.*

Simultaneous policies.—Two policies in different companies were to take effect at the same hour of the same day, one of which policies provided that if insurance should be or should hereafter be made, covenant should be given, etc. In a suit on the policy which so stipulated, the Court observed that whether the other was prior or subsequent, was immaterial. If prior, the defendant ought to have had notice of it, and if subsequent, it ought to have had it. Though the risk commenced, as to each, at the same moment, yet, without proof it cannot be presumed that the agents of two different companies issued to the same assured simultaneous policies. The presumption in law, as well as in fact, is, in the absence of proof, that one policy was antecedent to the other, and that notice ought to have been given. And looking at the reason and object of the provision, it seems that if proof had been made of the simultaneousness of the policies, notice should have been given: *Manhattan Ins. Co.* v. *Stein, supra.* Defendant company insured plaintiff, and without his authority placed part of the risk in another company. Both policies were of the same tenor and date. That obtained by defendant was neither prior nor subsequent to its own, and the absence of the required indorsement from it did not affect the other policy: *Washington Co.* v. *Davison* (1868), 30 Md. 91.

Renewed and substituted policies.—A renewal is in one sense a new contract, but it is not other insurance within the meaning of policies. It is but a continuation of an existing insurance. If notice of the original insurance has been properly given, it is good through all true renewals of it: *Pitney* v. *Glen's Falls Co., supra;* approving *Brown* v. *Cattaraugus Mut. Co.* (1858), 18 N. Y. 385. But renewing insurance which it was represented would expire at a given time, and would not be renewed, avoids a policy: *Dietz* v. *Mound City Mut. Co.* (1866), 38 Mo. 85.

In substituting a policy for an expired one, which was carried by consent, the amount being the same, is not contrary to the usual condition: *First Baptist Society* v. *Hillsborough Mut. Co.* (1849), 19 N. H. 580; *Russell* v. *State Co.* (1874), 55 Mo. 585, 595; *New Orleans Ass'n* v. *Holbery* (1886), 64 Miss. 51. Other insurance was allowed. Notice was required to be given of all additional insurances, and of all changes which might be made therein. A new policy was obtained from the same company as that whose policy was consented to, and for the same sum. The total amount of the insurance was distributed materially different by the second policy than by the former one. The omission to give notice was fatal to the claim under the original policy: *Simpson* v. *Pennsylvania Co.* (1861), 38 Pa. 250. Unless notice is required in such a case by the terms of the policy, it need not be given: *American Co.* v. *McCrea* (1881), 8 Lea (Tenn.), 513. But see *infra.*

The application covenanted that the property upon which insurance was desired was then insured for $8000 in two companies named. This was not true. Soon after the desired policy issued, policies were obtained in two other companies for that amount. Notice of these was not given as required, and it was claimed that because the whole amount of insurance did not exceed the sum which was allowed, the obligation to give notice did not apply. The Court ruled that the insurance obtained was other insurance than that to which consent was given, and the failure to give notice was fatal: *Conway T. Co.*

v. *Hudson R. Co.* (1853), 12 Cush. (Mass.) 144.

If notice of subsequent insurance is required to be given, the fact that a policy obtained is a substitute for a previous one issued by another company, notice of which was given, and for a less amount, does not relieve the insured from complying with the condition: *Burt* v. *People's Mut. Co.* (1854), 2 Gray (Mass.), 397.

Extent of forfeiture. — If the premium is entire, and the conditions of a policy insuring the whole property have been violated by obtaining one which covered only part of such property, the whole claim under the prior policy is forfeited: *Kimball* v. *Howard Co., supra; Allen* v. *Merchants' Mut. Co., supra.* This is the rule if the property is so situated as to constitute substantially one risk, though the policy apportions the insurance to each class of property, in this case, a building and the furniture in it: *Havens* v. *Home Co.* (1887), 111 Ind. 90. The cases which hold with and against this view are collected in the opinion in this case, and also in Berryman's Insurance Digest, pp. 830–833, and notes. They arose out of breaches of other conditions than are herein considered, and for that reason are not stated here.

Notice of other insurance.—There is an obvious distinction between notice of a past and subsisting insurance, and notice of a desire or intention to obtain a future insurance. A subsisting insurance is a fact, and capable of proof. If written notice of it be given, the company makes its new policy with absolute knowledge that double insurance will subsist the moment it is made; and it subsists by its act and consent. But mere notice that the insured wishes to make further assurance, to which assent is not given, then or after it is made, does not have the same effect: *Forbes* v. *Agawam Mut. Co.* (1852), 9 Cush. (Mass.) 470. If it is required that notice shall be given to the company, and indorsed on the policy, or acknowledged in writing, notice of an intention to procure other insurance, given to the agent of the company which has insured the property, is not sufficient: *Kimball* v. *Howard Co. supra; Healey* v. *Imperial Co.* (1869), 5 Nev. 268; *New Orleans Ass'n* v. *Griffin* (1886), 66 Tex. 232; *Schenck* v. *Mercer Mut. Co., supra.* Notice that there is another insurance, and that it is the intention to renew it, is not notice of the fact of renewal: *Healey* v. *Imperial Co., supra.*

A requirement that notice shall be given with "reasonable diligence," is not satisfied by serving it seven months after a second policy was obtained, and after a loss had occurred: *Kimball* v. *Howard Co., supra.* The words "reasonable diligence" make unnecessary delay fatal to a recovery. An unexplained failure to serve notice for nineteen days is conclusive proof of a want of such diligence: *Mellen* v. *Hamilton Co.* (1858), 17 N. Y. 609–620. If the insured has a specified number of days in which to give notice, the insurer is not relieved, unless it shows that the forbidden policy was in force for that length of time before the loss: *Cumberland Mut. Co.* v. *Giltinan* (1886), 48 N. J. L. 495.

The first insurer is not chargeable with the knowledge of a broker who effected a subsequent insurance in that capacity, and whose services were compensated by such insurer by commissions on the premiums he paid on such risks as were accepted: *Mellen* v. *Hamilton Co., supra; Royal Co.* v. *McCrea* (1881), 8 Lea (Tenn.), 531. If the policy provides that the broker who effected the insurance shall be the insured's agent, notice

to him does not affect the company: *Fire Ass'n* v. *Hogwood* (1886), 82 Va. 342.

A condition which requires notice to the company is not met by giving it to one who had been its agent, but who had ceased to act as such, and had given public notice to that effect: *Illinois Mut. Co.* v. *Malloy* (1869), 50 Ill. 419. If it is not provided how or to whom notice shall be given, and it is given to an agent who has apparent authority, under circumstances indicating that he had general power, then, although the fact was that his authority was limited, the insured being without knowledge of the extent of his power, notice to him binds his principal: *Phœnix Co.* v. *Spiers*, Ct. App. Ky., May, 1888. Knowledge of the agent who issued the policy, and his agreement that further insurance may be taken, binds his principal, if notice is not required to be given the company in writing: *Kenton Co.* v. *Shea* (1869), 6 Bush (Ky.), 174; *Von Bories* v. *United Co.* (1871), 8 Id. 133. Notice to an agent, while he is such, concerning business within the scope of his authority, is notice to his principal. The policy issued by defendant's agent, who was also agent for another company, had expired, and he had notified the insured that it could not be renewed on the same terms. The insured made known to the agent his purpose to keep up all the insurance he usually carried, and procured a policy for the same amount in another company, and told the agent what he had done. The latter said it was all right: *Hayward* v. *National Co.* (1873), 52 Mo. 181, overruling *Hutchinson* v. *Western Co.* (1855), 21 Id. 97, which held that the condition as to the indorsement of consent was a condition precedent to the right to recover, and that nothing would prevent a forfeiture but an actual indorsement. In accord with the later Missouri case are *N. E. F. & M. Co.* v. *Schettler*, *supra*; *Miller* v. *Hartford Co.* (1886), 70 Iowa, 704; *Schenck* v. *Mercer County Mut. Co.*, *supra*. The agent's neglect to make the proper indorsement cannot affect the insured's rights: Ibid.

It was required that all applications should be in writing. The blanks prepared did not contain a form for a statement as to other insurance, which was required to be given to the company. Parol notice given an agent who was empowered to solicit contracts, make surveys, and receive applications while he was preparing the application for the policy in suit, was held sufficient, though the company never received it: *McEwen* v. *Montgomery Mut. Co.* (1843), 5 Hill (N. Y.), 101. A condition requiring the insured to give notice of other insurance made on his behalf, does not require notice of insurance made otherwise than by his authority or subsequent sanction: *Franklin Co.* v. *Drake* (1841), 2 B. Mon. (Ky.) 47.

In the absence of a requirement as to the form of notice and the manner of its service, any definite and certain information communicated to an agent authorized to act for the company, by the insured or his agent, is all that is necessary: *Union Co.* v. *Murphy* (1886), Sup. Ct. Pa., 17 W. N. C. 243.

If a prior policy has been issued by the same agent who granted a second one, to a party who had an insurable interest in the property, and the person insured by the second policy did not know of the existence of the first, his failure to give notice is immaterial: *Rowley* v. *Empire Co.* (1867), 36 N. Y. 550.

If an insurer has failed to issue a policy according to its contract, it cannot visit upon the insured prejudicial results growing out of its neglect. In

such a case notice to the local agent of other insurance is all that is required, and his consent or acquiescence is equivalent to an indorsement: *Baile* v. *St. Joseph Co.* (1881), 73 Mo. 371. Actual knowledge of the other insurance is all that the first insurer can insist upon: *Eureka Co.* v. *Robinson* (1867), 56 Pa. 256.

If the policy of a mutual company requires that written notice shall be given the company, and acknowledged by the secretary in writing, the mere knowledge of an agent, who is not authorized to issue policies, is not such notice as binds his principal: *Commonwealth Mutual Co.* v. *Huntzinger*, *supra*. A condition requiring that notice shall be given to the company, and that it shall be indorsed, or otherwise acknowledged in writing, is not complied with by exhibiting a memorandum of subsequent insurance to an agent of the first insurer who was authorized to receive notice thereof and to enter it on his policy-book, though such agent took the memorandum to make an entry and returned it to the insured, and said that he had entered it, and that it would be indorsed on the policy, no such entry being in fact made: *Worcester Bank* v. *Hartford Co.* (1853), 11 Cush. (Mass.) 265. *Contra: Illinois Mut. Co.* v. *Malloy*, *supra*. See the cases stated *supra*, and the paragraphs "Estoppel" and "Waiver, *infra*."

A mistake in a notice regularly given, whereby it appeared that the whole of the additional insurance was placed in one company, the fact being that it was equally divided between two companies, is immaterial: *Benjamin* v. *Saratoga Mut. Co.* (1858), 17 N. Y. 415. If the fact of other insurance is regularly made known, the terms and conditions upon which it was made are immaterial, no questions being asked relating thereto: *McMahon* v. *Portsmouth Mut. Co.* (1850), 22 N. H. 15.

The proposals for insurance and the policy required that notice of all previous insurance should be given the company and indorsed on the policy or otherwise acknowledged by it in writing. Held, that, at law, whatever might be the case in equity, mere parol notice was not sufficient; that it was necessary that a prior policy should be mentioned in or indorsed upon the later one: *Carpenter* v. *Providence Co.*, *supra*.

Consent to other insurance.—Under the by-laws of a mutual company, any policy which it issued on property previously insured, was to be void, unless the previous insurance was expressed therein. The policy in suit contained this condition, but did not contain any statement as to existing insurance. The company had knowledge that there was insurance on the property, and that it was the insured's intention that it should continue. He accepted the policy without knowing that it did not mention such insurance. It was ruled, in a suit by his assignee, that the failure to comply with the condition avoided the policy, and parol evidence could not be received to remedy the defect: *Barrett* v. *Union Mut. Co.* (1851), 7 Cush. (Mass.) 175. Defendant's by-laws required that subsequent insurance should have "the consent of the directors, signified by a statement thereof in the policy, or by indorsement thereon, signed by the secretary." One of its directors indorsed a memorandum made by the applicant on his application, which was thereon when it reached the company, and was as follows: "Applicant asks leave to insure $1000 on same property in some other company. Please signify the assent of the company in the policy." This was not in compliance

with the by-laws: *Forbes* v. *Agawam Mut. Co.*, *supra*. The required assent was not inferable from the knowledge of the agent who issued both policies: Ibid. The charter of the defendant company gave it the power to make by-laws, and they provided that any insurance subsequently obtained, without the president's written consent, should avoid any policy it had issued. The by-law containing this provision was attached to the policy in suit. The verbal consent of the president to other insurance, was not binding on the company: *Hale* v. *Mechanics' Mut. Co.* (1856),6 Gray (Mass.), 169.

A mutual company, whose by-laws provide that certain of its officers may consent to other insurance, is not bound by consent given by its agent: *Behler* v. *German Mut. Co.* (1879), 68 Ind. 347. None but the officers authorized can give binding consent: *Stark Mut. Co.* v. *Hurd* (1850), 19 Ohio, 149, 177.

If the secretary of the first insurer has knowledge of a subsequent policy, and advised that it be procured, and two of its directors verbally assented thereto, such number being authorized to issue policies, and the condition did not require that the notice or consent should be in writing, but did require the consent of the directors, five in number, a majority of whom could transact business, such consent is good: *Goodall* v. *New England Co.* (182), 25 N. H. 169, 194.

The policy provided that it would not be valid, unless countersigned by a general agent at a designated place, and prohibited other insurance, prior and subsequent, without written consent thereon. It was said that every sound rule of construction required that consent should be signed by the designated agent. An unsigned consent could not be sustained in the absence of such agent's signature, without distinct proof that it was made by some one who was, in fact, or by his conduct might fairly be supposed to be, authorized to bind the company in that way, unless his act was so recognized and acted upon as to bind it by es oppel: *Security Co.* v. *Fay* (1871), 22 Mich. 467.

An agent who is authorized to make and revoke contracts, is the proper person to consent, if his powers are not restricted, or the insured has no notice of the limitations on them: *Planters' Mut. Co.* v. *Lyons* (1873), 38 Tex. 253. If the agent who effects the insurance, and is intrusted with the policy to deliver it to the insured, is notified, before the policy reaches him, of other insurance, and makes the proper indorsement, the company is bound by his act: *Dayton Co.* v. *Kelly* (1873), 24 Ohio St. 345. Under a condition that assent should be indorsed on the policy, or else assented to in writing, if an agent authorized to issue a policy delivers it with knowledge of prior insurance, the policy so delivered is the written assent of the company to such insurance: *Kenton, etc. Co.* v. *Shea*, *supra*. Verbal consent given by an agent, with knowledge that it will be acted on, waives the requirement that the consent shall be written upon the policy: *Carrugi* v. *Atlantic Co.* (1869), 40 Ga. 135. If it was given under such circumstances as obliged him to consent or refuse, and was unequivocal and with knowledge of all the facts, there is a waiver: *New Orleans Ass'n* v. *Griffin*, *supra*. All the policies were issued by the same agent. He testified that the insurers were notified of the fact that there was other insurance, and his books, as defendant's agent, showed the fact that other policies were issued. It was ruled that the object and purpose of indorsing consent

on the policy was fully attained: *Insurance Co. of N. A.* v. *McDowell* (1869), 50 Ill. 120.

Defendant's policy was not to be valid unless it was countersigned by the agent who issued it. Immediate notice of other insurance was required to be given to its secretary. Eight months after it was issued, and before loss, such agent indorsed his consent to such insurance, and notified the company. No objection was made. *Held*, that if the company desired to repudiate the policy, it ought to have done so on receipt of the notice. It could not, with knowledge of the facts, retain the premium and withhold objections until after loss: *Farmers' Mut. Co.* v. *Taylor* (1873), 73 Pa. 342.

A general agent's verbal consent binds his principal, although the policy provides that none of its conditions shall be waived, except by writing. Consent to other insurance is given by promising to indorse it on the policy: *Morrison* v. *Insurance Co.* (1887), 69 Tex. 353.

The knowledge of one who is employed by the general agent of an insurer to solicit risks and collect premiums, and who has power to bind the company from the date of the application until such agent acts thereon, and who is paid a commission by such agent, binds the company: *Hamilton* v. *Home Co.* (1887), 94 Mo. 353.

A letter written by defendant's secretary to plaintiff stated: "I have received your notice of additional insurance." This was a sufficient acknowledgment and approval to satisfy a condition requiring the consent to be indorsed or otherwise acknowledged and approved in writing. After the receipt of notice the policy continued in force until the insurer made its election to continue or terminate the risk: *Potter* v. *Ontario Mut. Co.* (1843), 5 Hill (N. Y.), 147.

If the president of a company has knowledge of other insurance on the property before, it issues a policy thereon, and omits to make the required indorsement, the absence of such indorsement, in a suit to reform the contract, cannot be urged: *National, etc. Co.* v. *Crane* (1860), 16 Md. 260–296.

An offer by an agent to take other insurance is not a consent to any specific additional insurance, and does not meet a requirement that consent shall be written on the policy: *Allemania Co.* v. *Hurd* (1877), 37 Mich. 11.

A by-law requiring consent to be written in the policy is satisfied by writing it on the margin of the policy: *Liscom* v. *Massachusetts Mut. Co.* (1845), 9 Met. (Mass.) 205. A statute requiring that consent that shall be signified by indorsement on the the back of the policy, signed by the president and secretary, is complied with by a recital in the policy of the prior insurance and its amount, the policy being signed by the officers designated: *First Baptist Society* v. *Hillsborough Mut. Co.*, *supra*. If consent to additional insurance is in writing, it is good though it is not written on the policy, as that instrument required it should be: *Mattocks* v. *Des Moines Co.* (1887), 74 Iowa, 233. The consent need not specify the companies in which the additional insurance may be placed, if there is no restriction in the policy: *Westchester Co.* v. *Earle* (1876), 33 Mich. 143.

If insurance is taken in excess of the sum specified in the consent, and is in force when the loss occurs, the consenting insurer is relieved from liability: *Shurtleff* v. *Phœnix Co.* (1869), 57 Me. 137; *Bonneville* v.

Western Co. (1887), 68 Wis. 298; *Behrens* v. *Germania Co.* (1882), 58 Iowa, 26. But the insured is not bound to take the full amount permitted: *Liscom* v. *Boston Mut. Co.* (1845), 9 Met. (Mass.) 205. Consent to take additional insurance to a specified amount, means prior as well as subsequent insurance: *Behrens* v. *Germania Co.*, *supra.*

If a contract for present insurance is made, and a policy is to be issued subsequently on the same risk, the contract being subject to the conditions of the printed policy, a condition therein, requiring that other insurance shall be indorsed on the policy, does not make it necessary that an indorsement be made in or on the contract: *Dayton Co.* v. *Kelly* (1873), 24 Ohio St. 345.

Oral consent given by an agent, to an agent of one insured, to take additional insurance for his principal, does not follow an assignment of the policy, and authorize him who was the insured's agent, to take other such insurance after he has become the owner of his principal's property: *Hower* v. *State Co.* (1882), 58 Iowa, 51.

Estoppel.—If the insurer, on being notified of other insurance by its agent, does not make the proper indorsement or notify the insured that it refuses to carry the risk, it is estopped from claiming a forfeiture: *Planters' Mut. Co.* v. *Lyons* (1873), 38 Tex. 253. Defendant issued a policy for $6000, and at its request, was relieved of one-half of the risk, which the insured placed in a company named by the first insurer. Defendant's policy was given to its agent for the purpose of having the proper indorsement made. This he neglected to do. *Held*, on demurrer, that defendant was bound to give consent, and to do all other acts which might be necessary to prevent the insured from being injured by the additional insurance: *Cobb* v. *Insurance Co. of N. A.* (1873), 11 Kan. 93.

The complaint alleged the execution of the policy sued upon, the loss of the property covered by it, and that it was expressly agreed and understood that said plaintiff was to have permission to take out an additional insurance of $1000 on said building in any other company and at any time she desired, and said company agreed to insert said condition in said policy, which it wholly failed to do. The plaintiff averred, that relying upon said promise, and in pursuance of said contract and agreement, she had effected an insurance on said building, as permitted by the express agreement aforesaid. No notice of the second insurance was given. In addition to the usual clause, prohibiting other insurance, the policy in suit expressed that nothing less than a distinct, specific agreement, clearly expressed and indorsed on it, should be construed as a waiver of any condition or restriction in it. The complaint did not show an estoppel, because it did not appear that plaintiff was induced to accept the policy, without knowledge that the stipulation was not on it; nor that she ever requested that it should be indorsed: *Havens* v. *Home Co.* (1887), 111 Ind. 90.

An insurer is not estopped from claiming a forfeiture, if its conduct has not misled the insured to his prejudice. Mere knowledge, on its part, that he has violated the conditions of the contract, is immaterial: *New York Co.* v. *Watson* (1871), 23 Mich. 486.

A policy in a mutual company expressly referred to the act which incorporated it and the by-laws of the company. Two sections of the charter

were printed on the back of the policy, but in such a way as not to indicate that the entire instrument was set out there. Among the omitted provisions were those which forbade other insurance without the consent of the directors, indorsed on the policy. It was claimed that the company was estopped from setting up the provisions referred to, because they were not made a part of the policy. This position was held untenable, and the whole of the charter and by-laws were considered part of the contract: *Fabyan* v. *Union Mut. Co.* (1856), 33 N. H. 203.

If the indorsement which gave consent to other insurance authorized the insured to carry a less amount than the notice specified, and was consented to, and the insured did not notice the variance until after loss, evidence to show that consent was given to the full amount taken is admissible: *Greene* v. *Equitable Co.* (1877), 11 R. I. 434.

If notice of other insurance is given to an agent, who has full discretion in the premises, and who did not object to it, and said nothing about cancelling the first policy, and who subsequently effected additional insurance on the same risk in other companies he represented, the first insurer is estopped: *Crescent Co.* v. *Griffin* (1883), 59 Tex. 509; *Hadley* v. *N. H. Co.* (1875), 55 N. H. 110; *Fishbeck* v. *Phœnix Co.* (1880), 54 Cal. 422; *Hayward* v. *National Co.* (1873), 52 Mo. 181; *Harwitz* v. *Equitable Co.* (1867), 40 Id. 557; *Russell* v. *State Co.* (1874), 55 Id. 585. If a soliciting agent, with knowledge of existing insurance, prepares an application for a policy and represents therein that there is no insurance, and the applicant signs it in good faith, the company cannot set up the prior insurance: *American Co.* v. *Luttrell* (1878), 89 Ill. 314. And this is so if an agent, acting for two companies, falsely informs the insured that the proper indorsement had been made: *Mentz* v. *Lancaster Co.* (1875), 79 Pa. 475; *Redstrake* v. *Cumberland Mut. Co.* (1882), 44 N. J. L. 294; *Combs* v. *Shrewsbury Mut. Co.* (1881), 34 N. J. Eq. 403. Or, that an indorsement was not necessary: *Kitchen* v. *Hartford Co.* (1885), 57 Mich. 135. Or, if the agent of the first insurer has led the insured to believe that he has no objections to his obtaining another policy: *American Co.* v. *Gallatin* (1879), 48 Wis. 36.

Notwithstanding the first policy requires the written consent of the company to other insurance, and provides that the use of general terms or anything less than a distinct specific agreement, clearly expressed, and indorsed on it, shall not be construed as a waiver of any condition or restriction therein, yet, if an agent authorized to issue policies, and who has issued the one in suit, and whose power does not appear to have been restricted in any way, has so acted with the insured as to bind himself, by estoppel, not to dispute the validity of the subsequent policy, his principal is also estopped: *Westchester Co.* v. *Earle* (1876), 33 Mich. 143. But, if the policy gives the insured notice that the insurer's agent cannot waive, modify, or strike from it, any of its provisions, nor revive it, if a forfeiture shall have accrued, the insurer is not estopped by the agent's assurance to the insured that other insurance will be all right: *Cleaver* v. *Traders' Co.*, Sup. Ct. Mich., April, 1887.

After a loss, and with knowledge of the violation of defendant's policy, its general agent required the insured to furnish plans and specifications of the building destroyed. In doing so,

expense was incurred. This was held decisive as to the defendant, and it could not thereafter claim that a forfeiture had accrued. It was immaterial that another insurer of the same property made a similar requirement; and it seems that it would have been immaterial if both insurers had joined in such demand: *Webster* v. *Phœnix Co.* (1874), 36 Wis. 67. An insurer, whose agent, with full knowledge of the existence of other policies on the property, participates in adjusting a loss and acquiesces in the apportionment made to each of the insurers, and promises to pay the proportion due from his company, is estopped, if the insured has settled with the other insurers on the basis of the adjustment: *Fishbeck* v. *Phœnix Co.* (1880), 54 Cal. 422.

Waiver.—Permission given by indorsement on a policy, to obtain additional insurance to a specified amount, waives a printed requirement that notice of other insurance shall be given, if insurance is not taken in excess of the limit: *Benedict* v. *Ocean Co.* (1865), 31 N. Y. 389; *American Co.* v. *McCrea* (1881), 8 Lea (Tenn.), 513. If the question in the application, concerning other insurance, is not answered, and a policy is issued thereon, the condition in the latter relating thereto is waived: *Dayton Co.* v. *Kelly* (1873), 24 Ohio St. 345. If the insurer, after receiving notice of other insurance from its general agent, omits to cancel its policy, by returning a proper proportion of the premium, it waives the right to claim a forfeiture: *Von Bories* v. *United Co.* (1871), 8 Bush (Ky.), 133. If the secretary of the company which issued a policy, declares in writing, knowing all the facts, that the policy is good, and subsequently levies an assessment upon it, such act is a waiver of the lack of indorsement and confirms the policy: *Atlantic Co.* v. *Goodall* (1857), 35 N. H. 328. So held as to the assessment: *McKenzie* v. *Planters' Co.* (1872), 9 Heisk. (Tenn.) 261. Making an adjustment, with knowledge of the breach of a condition, is a waiver: *Levy* v. *Peabody Co.* (1877), 10 W. Va. 560.

Consent was required to be indorsed upon the policy. Plaintiff signed a blank application, which was filled out by defendant's general agent; at the latter's request, the former delivered to him policies upon the same property in another company, which had been issued by him as its agent. No mention was made in the application for the policy in suit, which was filled up by the agent and forwarded to defendant as an accepted application, of the existence of the former policies. The Court observed that when the former policies were handed the agent at his own request, he must have known what the object was, and had full opportunities to acquire information by reading them. He was clearly put upon inquiry to know their relation to the subject on hand. The plain presumption is that he read the policies and acquired full information of their existence and contents. The notice thus supplied to him was, on general principles of the law of agency, notice to the defendant. It must be assumed, accordingly, that owing to his general agency, the defendant knew that there was other insurance on the property, and with that knowledge, made no statement of the fact on the policy. This act may be called a waiver, or may be treated as an estoppel: *Pitney* v. *Glen's Falls Co.* (1875), 65 N. Y. 6–28.

Other concurrent insurance to the amount of $3000 was allowed by defendant's policy, which provided that it should be part of the contract, "that any person other than the

assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The agent who delivered the policy, knew that the property which it covered, was insured to the amount of $6000. Such delivery was held to be an implied waiver of the condition prohibiting more than $3000 other insurance: *Putnam* v. *Commonwealth Co.* (1880), 18 Blatch. (U. S. C. Ct. N. D. N. Y.) 368; s.c. (1880), 4 Fed. Repr. 753.

If a general agent of a foreign company, who is authorized in writing, to countersign and issue policies, "and otherwise to do and perform the customary acts and duties of" an insurance agent, and whose duty, it is shown by the testimony in the case, is to make indorsements of other insurance, has knowledge of such insurance, and does not disclaim the authority to make such indorsement, but postpones doing it, on account of his own convenience, when the policies are produced for that purpose, the condition requiring such indorsement will be considered waived. The knowledge and consent of such an agent as to the amount of insurance, are not made ineffectual because he does not know in precisely what companies it is placed; and a change to another company, otherwise unexceptionable, does not alter the rule: *American C. Co.* v. *McCrea* (1881), 8 Lea (Tenn.), 513.

If an agent, having authority, insures property, with knowledge that policies are outstanding upon it, the condition providing for a forfeiture, is thereby waived: *Lycoming Co.* v. *Barringer* (1874), 73 Ill. 230; *Richmond* v. *Niagara Co.* (1879), 79 N. Y. 230; *Hornthal* v. *Western Co.* (1883), 88 N. C. 71; *Schomer* v. *Hekla Co.* (1880), 50 Wis. 575; *Brandup* v. *St. Paul Co.* (1880), 27 Minn. 393; *Geib* v. *International Co.* (1870), 1 Dill. (U. S. C. Ct. D. Minn.) 443. Although the policy issued by such agent, provides that anything less than a distinct, specific agreement, clearly expressed and indorsed thereon, shall not be construed as a waiver of any restriction in it: *Roberts* v. *Continental Co.* (1877), 41 Wis. 321. Under such a condition as is last stated, and a requirement that a waiver shall be signed by the secretary, if a general agent receives a renewal with knowledge of other insurance, the right to claim a forfeiture is waived: *Carroll* v. *Charter Oak Co.* (1868), 1 Abb. Ct. App. (N. Y.) 316: affirming s. c. (1863), 40 Barb. (N. Y.) 292.

If part payment of a loss is made, under a policy which was issued by an agent, with knowledge of the existence of other policies, the insured may recover the full amount: *Sherman* v. *Madison Mut. Co.* (1875), 39 Wis. 104. Taking part, by an agent, in adjusting a loss, and calling upon the insured for information, in furnishing which he incurred expense, is a waiver: *Carpenter* v. *Continental Co.* (1886), 61 Mich. 635. After knowledge of other insurance and after loss, defendant's adjuster wrote plaintiff, in reply to a request for information as to the attitude of the company concerning the loss, that if insured has a fair and legal claim under the policy, he should make out "such proofs as the policy requires and send same here; and on receipt of same, the claim shall be investigated at once, and you shall be promptly advised of our views." Plaintiff made proof of his loss and incurred expense in doing so. This was held to be a waiver: *Cannon* v. *Home Co.* (1881), 53 Wis.

585. After the loss, the defendant's adjusting agent, with knowledge of the second policy, made an offer of compromise, and raised objections to such policy. The offer was declined, and the agent soon after wrote plaintiff that she might make proof of loss, and the matter would then be taken into consideration. At the agent's request, defects in the proofs were remedied from time to time, and plaintiff was notified that "in addition to the objections heretofore made," defendant would insist upon the forfeiture, because of the second insurance. *Held*, that these facts warranted a finding that defendant waived the forfeiture: *Pennsylvania Co.* v. *Kittle* (1878), 39 Mich. 51.

A general agent of a stock company, whose place of business is remote from the company's office, and who is authorized to issue policies and indorse consent to other insurance, may bind his principal by a parol waiver of the condition, requiring insurance to be indorsed. Such waiver is provable by parol evidence: *Pechner* v. *Phœnix Co.* (1875), 65 N. Y. 195.

The agent who issued defendant's policy, also issued one for another company on the same property, and subsequently consented to a substitution of the latter policy, but omitted to make the proper indorsement on the one in suit. The condition was thereby waived: *Collins* v. *Farmville Co.* (1878), 79 N. C. 279.

Under a statute, which provides that any person who shall solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the company which issues the policy, an agent of the company who is authorized to issue policies, and who sends his clerk to solicit a risk and take an application, is bound by the latter's knowledge of other insurance, and the company which issues a policy pursuant to the application, cannot be relieved from liability, because the required indorsement was not made: *Bennet* v. *Council Bluffs Co.* (1887), 70 Iowa, 600.

The insurer is not bound, after knowledge that its policy has become forfeited, and of a loss, to return the premium for the time the policy had to run, from the loss till it would have expired: *Phœnix Co.* v. *Stevenson* (1879), 78 Ky. 150.

Parol evidence cannot be received, to show that a policy prohibiting other insurance, was delivered with knowledge on the part of the company which issued it that there was then other insurance on the property. To admit such evidence would be contradicting a written instrument: *Batchelder* v. *Queen Co.* (1883), 135 Mass. 449; *Barrett* v. *Union, etc. Co.* (1851), 7 Cush. (Mass.) 175.

If the policy gives the insured notice that the agent of the insurer is not authorized to issue policies, nor to alter the terms of those issued, his consent cannot amount to a waiver of the requirement, that the consent of the company to other insurance shall be written on the policy: *Liverpool, etc. Co.* v. *Sorsby* (1882), 60 Miss. 302.

The receipt of information concerning other insurance, does not warrant the inference that there has been a waiver of the condition concerning changes in the distribution of the sum insured, upon the various classes of property covered by the policy: *Simpson* v. *Pennsylvania Co.* (1861), 38 Pa. 250. To constitute a waiver or estoppel, the act or conduct of the insurer must be such that the insured might reasonably infer therefrom, that it does not mean to insist upon the forfeiture, and the insured must have been misled to his prejudice. A direction to the insured, after the receipt of an informal claim against the

insurer, to the effect that if he has any claim against it under or by virtue of a policy, such claim must be made in strict accordance with the conditions prescribed, is not an admission of liability or a waiver, though the company then knew of additional insurance, contrary to its policy, and the insured subsequently made proofs of loss and incurred expense in doing so: *Phœnix Co.* v. *Stevenson* (1879), 78 Ky. 150. The condition requiring written consent, is not waived, where the right to claim a forfeiture was not known until after loss, and the insurer's agent appointed an appraiser to determine the value of the property saved, and the company did not return the unearned premium: *Jewett* v. *Home Co.* (1870), 29 Iowa, 562.

When the policy in suit was obtained, defendant's agent offered to place an additional $1000 on the property. The offer was declined. Subsequently the plaintiff took other insurance to the amount of $1800, and notified the agent that he had taken insurance, but did not name the amount. After a loss the agent of the first insurer told plaintiff that his policy required him to make proof of his loss. This he did, and forwarded it to the company. The amount of the additional insurance was first made known when the proof was received. No waiver or estoppel was established by these facts, assuming that the agent's offer to take the additional insurance amounted to a consent to the amount he offered to take: *Bonneville* v. *Western Co.* (1887), 68 Wis. 298.

Knowledge on the part of an agent of an insurer, that a person insured desires other insurance at a less rate than his company would give, and that it was subsequently obtained, is not evidence of consent or waiver of the written notice required: *Robinson* v. *Fire Ass'n* (1886), 63 Mich. 90.

An agent whose authority is limited to receiving applications, making surveys, remitting collections to the general agent and receiving the policies from him, cannot waive the conditions therein: *Haley* v. *Imperial Co.* (1869), 5 Nev. 268.

The charter of an insurance company is in the nature of an enabling act; it gives it all the power it possesses, and it is bound to exercise the power conferred upon it in the manner pointed out therein. Hence, if it is provided by the charter, that double insurance shall be void unless it exists by the consent of the company, indorsed upon the policy under the hand of the secretary, there can be no waiver of the requirement, and it cannot be proved that consent was given to other insurance, otherwise than by indorsement as specified: *Couch* v. *City Co.* (1871), 38 Conn. 181.

Compliance with a condition, requiring that subsequent insurance shall be indorsed, is not waived by notifying the insured, after he obtained such insurance, that an assessment was due from him, such notice being accompanied by a printed form, containing a schedule of losses, the insured's claim being included, and being marked "unadjusted." It did not appear that the company then knew of the forfeiture: *Forbes* v. *Agawam Mut. Co.* (1852), 9 Cush. (Mass.) 470.

Under the charter of a mutual company, one insured therein was deemed a member for the time specified in his policy, and was bound to pay his proportion of all losses and expenses happening to the company during his connection therewith. An assessment was paid after a loss of the property, but during the life of the policy. A

forfeiture previously incurred by the act of the insured, was not thereby waived: *Philbrook* v. *New England Mut. Co.* (1853), 37 Me. 137.

An agent of a mutual company, acting under a written appointment, made subject to a by-law, which made it his duty to take surveys and receive applications, and when required, to examine into the circumstances of a loss and make report, and, by the terms of a policy, to approve of assignments thereof, and collect assessments, is not authorized to accept notice of insurance beyond the amount allowed by the policy, or waive the consequences. This is especially the case in a mutual company, the insured being bound to know its rules: *Mitchell* v. *Lycoming Mut. Co.* (1865), 51 Pa. 402.

Explanatory.—In the foregoing statement of the cases which treat of the subject of other insurance, no attempt has been made at discussing, comparing or harmonizing the adjudications. Indeed, an effort to do the latter would be fruitless, and the lack of space forbids the experiment, as to either of the former. A casual survey and comparison of the cases and the dates of their decision will disclose that there is a marked and growing tendency on the part of the courts to liberalize, especially in the application of the principles of waiver and estoppel, against insurers. This has been made necessary by the conditions which have found their way into the modern policies. The same tendency is noticeable in the later cases, as to the powers of agents. But this is not so with regard to the validity of the second policy, or the New England rule of construction. For a long time, the weight of authority was in favor of that rule; but the scale has been turned the other way, by the adjudications of the past five or six years. Since 1880, but one court which was not committed to that rule, has declared in its favor; while eight or nine, which had not taken position on it, have, during the years since, adopted the opposing rule. The question is an open one in several jurisdictions, and therefore of practical importance. The number of cases in the courts of last resort is so great that the decisions of intermediate courts could not be considered; nor could those of foreign tribunals, which are principally to be found in the reports of the British colonies.

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In the recent case of *Commercial Union Assurance Co.* v. *Scammon*, Sup. Ct. Ill. Nov. 15, 1888, 28 AMERICAN LAW REGISTER, 190, an interesting question arose. After a property had been insured by the owner, another policy upon the same risk was, without the knowledge of the original assured, issued by the same company to a third person, who wrongfully claimed title. A loss having occurred, the amount of the latter policy was paid by the company to the second assured, who was subsequently, however, compelled by a decree in chancery to account for the moneys thus received to the real owner. It was held, that these facts constituted no defence to an action by the latter upon the first policy, and that he was entitled to recover, notwithstanding the second policy and the receipt by him of its proceeds under such decree.

JAMES C. SELLERS.